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No. 99-867

# In the Supreme Court of the United States

SAMUEL G. KOORITZKY, PETITIONER

*v.*

ALEXIS M. HERMAN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether a pro se litigant who is also a lawyer may be awarded attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), for the time he spent on his case or for the time spent on his case by other lawyers where petitioner did not establish that the other lawyers offered independent legal advice or assistance.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-72a) is reported at 178 F.3d 1315. The opinions of the district court (Pet. App. 1a-25a, 26a-54a) are reported at 6 F. Supp. 2d 1 and 6 F. Supp. 2d 13.

### JURISDICTION

The judgment of the court of appeals was entered on June 18, 1999. A petition for rehearing en banc was denied on August 23, 1999 (Pet. App. 73a). The petition for a writ of certiorari was filed on November 22, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner filed a successful lawsuit, pro se, in the United States District Court for the District of Columbia, against the Secretary of Labor, challenging the Department of Labor's promulgation of an interim final rule regarding immigrants for whom labor certifications are sought. Pet. App. 4a, 57a (citing *Kooritzky* v. *Reich*, 17 F.3d 1509 (D.C. Cir. 1994)).[1] Petitioner is a lawyer by profession and moved for an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d).[2] Petitioner sought an award of $427,662 under the EAJA, contending that he should recover attorney's fees for the time he spent on the case, as well as for time spent on the case by other lawyers and a law clerk. Pet. App. 57a-58a.

A magistrate judge recommended that petitioner be awarded $31,798.71 for his own work only. Pet. App.

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[1] Petitioner is an immigration lawyer who "sought to employ an alien for whom he was seeking certification as an 'employment-based' immigrant." Pet. App. 4a. The challenged rule "terminated the right of employers to substitute one immigrant applicant for another in the labor certification process." *Id.* at 57a.

[2] The EAJA provides in relevant part:

> [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A). The EAJA defines fees and expenses to include "the reasonable expenses of expert witnesses * * * and reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A).

58a. The magistrate judge recommended against an award of fees for any work by the other lawyers or paralegal because petitioner had no representation agreement with any of them and incurred no expense or obligation to pay them. *Id.* at 9a, 58a.

The district court accepted in part, and rejected in part, the magistrate judge's recommendation. Pet. App. 1a-25a; *id.* at 26a-56a. The court agreed that, under governing circuit law, petitioner was entitled to recover attorney's fees for his pro se work. *Id.* at 6a (citing *Jones* v. *Lujan*, 887 F.2d 1096, 1097 (D.C. Cir. 1989)). The court also ruled, however, that petitioner was entitled to recover attorney's fees for work performed by other lawyers and a paralegal. Pet. App. 10a-24a. The court awarded petitioner $55,992.06, for petitioner's own work and $82,754.98 for "co-counsel" fees. *Id.* at 58a.

2. The court of appeals reversed. Pet. App. 56a-72a. The court ruled that a lawyer acting pro se is not entitled to recover attorney's fees under the EAJA. The court concluded that its decision in *Jones* v. *Lujan*, *supra*, allowing recovery of attorney's fees under the EAJA by a pro se lawyer-litigant, was overruled by this Court's decision in *Kay* v. *Ehrler*, 499 U.S. 432 (1991), that a lawyer acting pro se may not recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988(b).

The court of appeals reasoned that the EAJA does not differ in any material way from Section 1988 which was at issue in *Kay*. Pet. App. 59a. The court also noted its own precedent regarding the attorney's fees provision under the Freedom of Information Act which it had construed, consistent with *Kay*, to bar an award to a pro se lawyer for his work and the work of his lawyer colleagues. *Id.* at 58a (citing *Burka* v. *United*

*States Dep't of Health & Human Servs.*, 142 F.3d 1286 (D.C. Cir. 1998)). The court of appeals emphasized that, in *Kay*, this Court "firmly declared" that the statute's use of the term "attorney" assumes "an agency relationship" and the *Kay* Court found it likely that "Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." Pet. App. 61a. The *Kay* Court buttressed its conclusion by relying on Section 1988's specific purpose "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Ibid.*

The court of appeals found no language in the *Kay* opinion suggesting that its rationale does not apply to a straightforward analysis of the text of other statutes, such as that involved in this case, that also speak of "attorney" fees. The court also relied on the similarities between the policies and purposes underlying the fee-shifting provisions of the EAJA and those of Section 1988. The court pointed out that a contrary rule would undermine another purpose of the statutes at issue in *Kay*, *Burka*, and this case, which is "to encourage potential claimants to seek legal advice before commencing litigation," because a pro se lawyer is "unlikely to have the 'detached and objective perspective necessary to fulfill the aims of the Act.'" Pet. App. 61a-62a. As in Section 1988, "the policy goals underlying the fee-shifting provision found in the EAJA support the conclusion that Congress sought to encourage the procurement of objective counsel to pursue claims against the government for violation of various federal rights." *Id.* at 63a-64a. The court noted that its ruling was consistent with opinions of the Second, Tenth, and Eleventh Circuits. *Id.* at 65a.

The court of appeals rejected petitioner's effort to "evade the prohibition against recovery of attorney fees

under the EAJA by seeking to characterize himself as an 'expert witness.'" Pet. App. 66a. The court noted that the claimed legal expertise was of questionable relevance, that petitioner's argument would mean that fee eligibility would "rest solely on the semantics of the litigant's fee petition," that statutory policy would be furthered by retention of objective outside experts, and that ethical questions would be raised by a pro se lawyer's acting as a witness. *Id.* at 66a-68a.

The court of appeals also held that petitioner was not eligible for attorney's fees for work performed by his purported "co-counsel." Pet. App. 68a. The court explained that, consistent with its *Burka* opinion and the *Kay* Court's conclusion that the term "attorney" assumes an agency relationship between the litigant and an independent lawyer, "[a] *pro se* attorney-litigant seeking to obtain attorney fees under the EAJA for work performed by co-counsel must demonstrate that his colleagues are situated to offer 'independent' legal advice and assistance." *Id.* at 69a. The court found that petitioner had not made such a showing here because the only entry of appearance on behalf of petitioner by any of the other lawyers was after petitioner prevailed on the merits and the court was determining the amount of fees, if any, petitioner could receive. *Id.* at 70a. The court also pointed to the fact that there was no formal agreement between petitioner and the other lawyers concerning fees for legal services rendered, no bills by any of the other lawyers for legal services rendered, and no accurate records kept by any of the other lawyers of time spent on the case, all of which indicated that petitioner's purported "co-counsel" were not, in fact, acting as his attorneys. *Id.* at 70a-71a. The court also noted that the record regarding a law clerk for whom petitioner sought fees was very

confusing, but that "[s]o far as [the court could] tell, he was neither eligible for nor did he receive any sort of fees." *Id.* at 71a n.1.[3]

**ARGUMENT**

Petitioner challenges the court of appeals' ruling that petitioner, as a pro se lawyer litigant, is not entitled to an attorney's fees award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), for his own work on his case. He also maintains that he should be able to recover a fee award for work performed by other lawyers and a paralegal. The court of appeals correctly rejected petitioner's claims and petitioner does not identify any issue that warrants further review by this Court.

1. Petitioner contends (Pet. 9-14) that the court of appeals erred in applying the rationale of *Kay* v. *Ehrler*, 499 U.S. 432 (1991), to the instant case which involves the attorney's fees provision in the EAJA, rather than 42 U.S.C. 1988 which was at issue in *Kay*. He argues that, because an award of attorney's fees is mandatory under the EAJA, rather than discretionary as under Section 1988, and because the EAJA does not involve the type of civil rights violations at issue in Section 1988 cases, a different analysis of the attorney's fees provision should govern EAJA cases. He claims (Pet. 11-12) that courts are in disagreement about the availability of attorney's fees under such fee-shifting statutes.

a. Although petitioner identifies two differences between the EAJA and Section 1988, *i.e.*, that the

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[3] In light of its ruling that petitioner was not entitled to any attorney's fees under the EAJA, the court found petitioner's objection to the amount of the fee award to be moot. Pet. App. 71a.

former provision is mandatory and is not limited to civil rights claims, he does not explain why those differences should require a different interpretation of the term "attorney" under the two statutory fee-shifting provisions. The court of appeals correctly rejected petitioner's argument, analyzing the statutory texts as well as the underlying purposes and policies and concluding that, under the EAJA, the term "attorney" is properly interpreted, as it was by this Court in *Kay*, to assume the existence of an agency relationship between the litigant and an independent lawyer and, thus, not to allow attorney's fee awards to pro se litigants who are lawyers. The court of appeals also correctly indicated that its interpretation of the two statutes in a similar manner is consistent with the fact that this Court "has noted in the past the similarity between the fee-shifting provisions of the EAJA and Section 1988, observing that the EAJA is 'the counterpart to § 1988 for violation of federal rights by federal employees.'" Pet. App. 62a (citing *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 89 (1991)). The court of appeals' interpretation of the EAJA attorney's fees provision is correct because it is consistent with the ordinary meaning of "attorney" (see Pet. App. 61a) and furthers the statute's policy goal "to encourage the procurement of objective counsel to pursue claims against the government for violation of various federal rights" (*id.* at 63a-64a).

b. Petitioner errs in contending (Pet. 11-12) that the decision below conflicts with the reasoning in *Doe* v. *Board of Education*, 165 F.3d 260 (4th Cir. 1998), cert. denied, 119 S. Ct. 2049 (1999), and *SEC* v. *Waterhouse*, 41 F.3d 805, 808 (2d Cir. 1994)).

In *Doe*, the Fourth Circuit held that a lawyer was not entitled to an attorney's fee award for legal services

he performed in obtaining special education benefits for his child under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* Although the court found that *Kay* did not "precisely parallel" that case because, under IDEA, the parent lawyer was not, in fact, acting pro se because he was advancing his child's rights rather than his own, the court found that the central rationale of *Kay* applied. 165 F.3d at 264. The court expressly relied on *Kay's* holding that "encouraging independent representation by prohibiting statutory awards to pro se attorney-plaintiffs furthered the fee-shifting statute's purpose of encouraging the effective prosecution of meritorious claims." *Id.* at 265 (citing *Kay*, 499 U.S. at 437). Moreover, the Fourth Circuit noted that two other circuits had found *Kay's* rationale to apply to the attorney's fee provision of the Freedom of Information Act. 165 F.3d at 262 (citing *Burka* v. *United States Dep't of Health & Human Servs.*, 142 F.3d 1286, 1290 (D.C. Cir. 1998); *Ray* v. *United States Dep't of Justice*, 87 F.3d 1250, 1252 (11th Cir. 1996))).

In *SEC* v. *Waterhouse*, the Second Circuit expressly held that "the Supreme Court's decision in *Kay* should also control under the EAJA." 41 F.3d at 808. That court also noted that the other courts of appeals that had ruled on the issue had reached the same conclusion. *Ibid.* (citing *Hexamer* v. *Foreness*, 997 F.2d 93, 94 (5th Cir. 1993); *Demarest* v. *Manspeaker*, 948 F.2d 655 (10th Cir. 1991), cert. denied, 503 U.S. 921 (1992); *Merrell* v. *Block*, 809 F.2d 639, 642 (9th Cir. 1987)).

Thus, the court of appeals here correctly observed that its ruling is in accord with the decisions of other circuits. Pet. App. 65a (citing *SEC* v. *Waterhouse*, 41 F.3d at 808; *Celeste* v. *Sullivan*, 988 F.2d 1069, 1070 (11th Cir. 1992); and *Demarest* v. *Manspeaker*, 948 F.2d

at 656). Although, as the court below recognized, some cases from other circuits have involved non-lawyer pro se litigants, nothing in those opinions is inconsistent with the ruling below.

2. Petitioner claims (Pet. 11, 14-17) that the court of appeals erred in holding that he did not have a bona fide attorney-client relationship with the other lawyers for whose work he also sought an attorney's fees award. He also contends (Pet. 18-19) that he is entitled to a fee award for the work performed by a paralegal.

a. Petitioner does not challenge the court of appeals' legal ruling that a pro se litigant who is a lawyer seeking recovery of attorney's fees for work performed by other lawyers must demonstrate that the other lawyers were "situated to offer 'independent' legal advice and assistance." Pet. App. 69a. Rather, petitioner argues that, in fact, he had an actual, bona fide attorney-client relationship with the other lawyers and thus should recover attorney's fees under EAJA for the time they spent working on his case.

That factual issue does not warrant review by this Court. In any event, the court of appeals correctly rejected petitioner's claim of an attorney-client relationship, in light of the findings that none of petitioner's colleagues entered an appearance for petitioner during the merits phase of the case, there was no agreement concerning fees for legal services rendered, none of petitioner's alleged co-counsel ever billed him for services rendered, and none of them received or contemplated receiving fees. As the magistrate judge concluded (after seven days of evidentiary hearings), "[n]obody expected to get paid." Pet. App. 70a. Indeed, as the court of appeals observed, it was only after petitioner prevailed on the merits that he and his colleagues realized that they might be able—in his

words—to "stick the government" for attorney's fees. *Ibid.* Accordingly, the court of appeals correctly held that petitioner could not collect attorney's fees for lawyers who did not act as his attorneys. *Id.* at 71a.

b. The court of appeals also correctly held that petitioner was not entitled to a fee award for services of a paralegal. Pet. App. 71a n.1. Petitioner contends that, at most, the court of appeals should have remanded the matter to the district court or it should have awarded fees for services of "an independent expert paralegal." Pet. 18. But the paralegal, a retired government employee who had some background dealing with administrative matters, was neither offered nor qualified as an expert witness in this case. He functioned, at most, as a law clerk to petitioner, assisting with the drafting of papers. And, as the district court recognized, this was a "routine APA case" (see Pet. App. 65a-66a) and no expert study or analysis was required.

Moreover, as the court of appeals observed in the context of rejecting petitioner's attempt to claim fees for himself as an expert, allowing a pro se litigant to recover fees for legal services by characterizing them as "expenses of expert witnesses" or the "reasonable cost" of various studies, rather than as attorney's fees, would vitiate the holding of *Kay* as applied to the EAJA and make the determination of fee eligibility rest on the semantics of the litigant's fee petition. Pet. App. 67a. The same reasoning applies to petitioner's claim for fees for the paralegal as an expert in this case because any award for that paralegal work would, in essence, be derivative of an award for attorney's fees to which petitioner is not entitled. Accordingly, the court properly held petitioner ineligible to claim attorney fees for himself by relabeling them as "expert expenses." *Id.* at 68a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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